Low Chang Hian v Kelab Golf DiRaja Selangor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S1–24–86–95
KC VOHRAH J
1 AUGUST 1995

Civil Procedure *— Affidavits — Originating summons procedure — Affidavit-in-reply — Time for filing — Whether time prescribed in O 32 r 13(2)(a) refers to summons in chambers only — Whether applies to originating summonses — Whether time prescribed by O 28 applies to originating summonses — Rules of the High Court 1980 O 28 & O 32*

The issue in this case was whether the defendant's affidavit-in-reply ought to be disregarded as it was not served in compliance with O 32 r 13(2)(b) of the Rules of the High Court 1980 ('RHC'), ie within 14 days from the date the plaintiff's affidavit in support was served on the defendant. The plaintiff's originating summons and affidavit in support were served on the defendant on 20 February 1995. The defendant's affidavit-in-reply affirmed on 16 May 1995 was filed and served on the plaintiff on 16 May 1995. Order 32 r 13(2) of the RHC which was introduced with effect from 1 August 1993 states that save as otherwise provided in the RHC, an affidavit in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application and a party wishing to reply must serve his affidavit within 14 days from the date on which the affidavit he intends to reply was served on him.

Held, dismissing the plaintiff's preliminary objection and ruling that the defendant's affidavit could be used:

(1) The word 'application' in O 32 r 13(2)(a) must be used in the context of O 32 which refers to applications made by way of Form 62 which is the form for a summons in chambers and not an originating summons. This is supported by the fact that O 32 rr 8 and 17–22 make specific mention of application by way of originating summons, clearly showing that the drafters of the RHC were well aware that O 32 is an Order where an application otherwise than those specified in rr 8 and 17–22 has to be by way of summons in chambers.

(2) On the other hand, O 28 deals with originating summons procedure and O 28 r 1 specifically provides that the provisions of the Order apply to all originating summonses subject to any special provisions relating to originating summonses of a particular class and, that subject as aforesaid, O 32 r 5 shall apply in relation to originating summonses as it applies in relation to other summonses. Such a provision makes it quite clear that the other provisions of O 32, including r 13(2), do not apply to

originating summonses. Order 32 r 13(2) is a general provision applying to affidavits used in summons in chambers only. A

(3) Admittedly there is a lacuna in the law as O 28 r 3(3) and (4) relate to the plaintiff's affidavits used in originating summonses and no mention is made as to the affidavit-in-reply of the defendant. However, that is not to say that in that event, O 32 r 13(2) has to be resorted to. B

[Bahasa Malaysia summary

Isu di dalam kes ini ialah sama ada afidavit jawapan defendan seharusnya tidak diendahkan kerana ia tidak disampaikan mengikut A 32 k 13(2)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), iaitu dalam tempoh 14 hari dari tarikh apabila afidavit sokongan plaintif disampaikan kepada defendan. Saman pemula plaintif dan afidavit sokongannya telah disampaikan kepada defendan pada 20 Februari 1995. Afidavit jawapan defendan yang telah diikrar pada 16 Mei 1995 telah difail dan disampaikan kepada plaintif pada 16 Mei 1995. Aturan 32 k 13(2) KMT yang telah berkuatkuasa dari 1 Ogos 1993 menyatakan bahawa kecuali seperti yang diperuntukkan di dalam KMT, sesuatu afidavit yang menyokong sesuatu permohonan mesti difail dan disampaikan kepada pihak yang bertentangan dalam tempoh 14 hari dari tarikh apabila permohonan itu difailkan dan pihak yang ingin menjawab mesti menyampaikan afidavitnya dalam tempoh 14 hari dari tarikh apabila afidavit yang beliau ingin menjawab itu telah disampaikan kepada beliau. C D E

Diputuskan, menolak bantahan permulaan plaintif dan memutuskan bahawa afidavit defendan boleh digunakan: F

(1) Perkataan 'permohonan' di dalam A 32 k 13(2)(a) mesti digunakan dalam konteks A 32 yang merujuk kepada permohonan yang dibuat mengikut Borang 62 yang merupakan borang bagi suatu saman dalam kamar dan bukannya suatu saman pemula. Ini disokong oleh hakikat bahawa A 32 kk 8 dan 17–22 merujuk secara spesifik kepada permohonan yang dibuat oleh saman pemula, yang jelas menunjukkan bahawa penggubal KMT benar-benar sedar bahawa A 32 adalah suatu Aturan di mana sesuatu permohonan selain daripada yang dinyatakan di dalam kk 8 dan 17–22 mesti dibuat oleh saman dalam kamar. G

(2) Sebaliknya, A 28 berkaitan dengan prosedur untuk saman pemula dan A 28 k 1 memperuntukkan secara spesifik bahawa peruntukan Aturan itu terpakai kepada semua saman pemula tertakluk kepada mana-mana peruntukan khas berhubung dengan saman pemula sesuatu kelas tertentu dan, tertakluk kepada perkara yang tersebut itu, A 32 k 5 akan terpakai kepada saman pemula dalam cara yang sama sepertimana ia terpakai kepada saman yang lain. Sesuatu peruntukan demikian menjadikannya amat jelas bahawa peruntukan lain A 32, termasuk k 13(2), tidak terpakai kepada H I

saman pemula. Aturan 32 k 13(2) adalah suatu peruntukan am yang terpakai kepada afidavit yang digunakan dalam saman dalam kamar sahaja.

(3) Adalah diakui bahawa terdapat lakuna di dalam undang-undang kerana A 28 k 3(3) dan (4) berkaitan dengan afidavit plaintif yang digunakan di dalam saman pemula dan tidak menyebut tentang afidavit jawapan defendan. Bagaimanapun, itu tidak bermakna bahawa di dalam keadaan sedemikian, A 32 k 13(2) mesti digunakan.]

Case referred to

PB Securities Sdn Bhd v Abdul Rashid bin Mohamed [1994] 3 MLJ 168 (folld)

Legislation referred to

Rules of the High Court 1980 O 7 r 2, O 28, O 32 r 13(2)(b), O 89

Azlan Khamis (*Ghazali Ariff & Partners*) for the plaintiff.
Christopher Leong (*Chooi & Co*) for the defendant.

Cur Adv Vult

KC Vohrah J: In this case the plaintiff raised a preliminary objection and argued that the defendant's affidavit-in-reply ought to be disregarded as the said affidavit was not served in compliance with O 32 r 13(2)(b) of the Rules of the High Court 1980 ('RHC'). The argument was that the said affidavit in reply was not served on the plaintiff within 14 days from the date the plaintiff's affidavit in support was served on the defendant as required.

The originating summons and the affidavit in support were served on the defendant on 20 February 1995. The defendant's affidavit-in-reply affirmed on 16 May 1995 was filed and served on the plaintiff's solicitors on 16 May 1995.

Order 32 r 13(2) of the RHC which was introduced with effect from 1 August 1993 states as follows:

> Save as otherwise provided in these rules —
>
> (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and
>
> (b) a party wishing to reply an affidavit served on him must file his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

It will be noticed that in r 13(2)(a) the nature of the affidavit has reference to it being used 'in support of an application'. The word 'application' must be used in the context of O 32 where r 1 sets out its nature, viz, 'Except as provided by Order 25, rule 7, every application in Chambers must be

made by summons in Form 62'. Form 62 is clearly the form for summons in chambers and certainly not the form for the originating summons where appearance is required (O 7 r 2; Form 6) nor the originating summons where appearance is not required (O 7 r 2; Form 7) nor the ex parte originating summons (O 7 r 2; Form 8) nor the originating summons for possession (O 89 r 2; Form 8A). It has to be noted, however, rr 8 and 17–22 of O 32 of the RHC state that applications under specific legislations, the Mental Disorder Ordinance 1952 and the Settled Estates Ordinance (SS Cap 52), are to be by way of originating summons. These provisions are an adaptation of English statutory provisions, ie O 32 r 9 of the English Rules of the Supreme Court 1965.

The point to note is that rr 8 and 17–22 of O 32 make specific mention of application by way of originating summons, clearly showing that the drafters of the rules were well aware that O 32 is an Order where an application otherwise than those specified in rr 8 and 17–22 has to be by way of summons in chambers.

As was pointed out earlier, O 7, O 28 and O 89 are connected with originating summonses. Order 7 deals with the forms of originating summonses, the contents of the summonses, the issue and duration and renewal of summonses. Order 89, introduced in 1984, deals specifically with summary proceedings for possession of land which have to be brought by originating summonses. Order 28 deals with originating summons procedure.

To be noted is that O 28 r 1 specifically provides that the provisions of the Order apply to all originating summonses subject, in the case of originating summonses of any particular class, to any special provisions relating to originating summonses of that class made by those rules or by or under any written law and, that subject as aforesaid, O 32 r 5, shall apply in relation to originating summonses as it applies in relation to other summonses. I think such a provision does make it quite clear that the other provisions of O 32 including r 13(2) of the Order do not apply to originating summonses.

Order 28 does have provisions relating to affidavits and so they need to be looked into. Rules 3(3) and (4) of O 28 are specific provisions relating to the use of affidavits in originating summons proceedings by the plaintiff.

They read:

> (3) Where the plaintiff intends to adduce evidence in support of an originating summons at the first hearing thereof he must do so by affidavit and, not less than 4 clear days before the hearing, serve a copy thereof on every defendant who has entered an appearance or, if the summons is one to which appearance is not required, on every defendant who has been served with the summons.
>
> (4) Not less than 4 clear days before the day fixed for the hearing on an ex parte originating summons the applicant must file an affidavit in support of the summons.

Order 28 r 3(3) above quoted clearly conflicts with O 32 r 13(2) (reproduced earlier) if the view is that O 32 r 13(2) is to apply to affidavits for originating summonses. That view obviously cannot prevail. Order 32 r 13(2) is a general provision applying to affidavits used in summons in chambers only.

Richard Talalla J has succintly summarized the principles and the case law to be used in construing rules which appear to conflict in *PB Securities Sdn Bhd v Abdul Rashid bin Mohamed* [1994] 3 MLJ 168 at p 171B–D:

> As to the principles to be applied in construing the Rules, in *Proprietors of Strata Plan No 159 v Parramatta City Council* (1985) 55 LGRA 363 at p 364, per Kirby P (NSW CA) it was stated that so far as is consistent with the language used, courts should endeavour to reconcile legislation, so that the provisions of several Acts can operate harmoniously with each other. In *Barker v Edger* [1898] AC 748 at p 754, per Lord Hobhouse (PC) it was said that when the legislature has given its attention to a separate subject and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject matter and its own terms. The same canon of construction has also been applied to the English Rules of the Supreme Court, see *Hasker v Wood* (1885) 54 LJQB 419 and *Bostock v Ramsey Urban District Council* [1900] 1 QB 357; [1900] 2 QB 616 and the county courts, see *Reeve v Gibson* [1891] 1 QB 652.

In the case of *PB Securities Sdn Bhd*, Richard Talalla J held in respect of the apparent conflict between r 13(2) of O 32, the same rule under scrutiny here, and O 14, that O 14 and r 13 of O 32 are not incompatible and can operate harmoniously with each other, as O 32 relates to applications and proceedings in chambers and in the absence of anything else, the order is to apply generally as r 13(2)(b) is expressly stated to apply save as otherwise provided in the rules.

Although rr 3(3) and 3(4) of O 28 relate to affidavits used in originating summonses, they refer to the affidavit of the plaintiff. No mention is made as to the affidavit-in-reply of the defendant.

Admittedly there is a lacuna in the law but that is not to say that, in that event, r 13(2) of O 32 has to be resorted to.

I rule that the defendant's affidavit may be used in this case.

Order accordingly.

Reported by Anne Khoo